No. 7084

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHAS. H. LILLY CO., a Corporation,
WILMOT H. LILLY,
KASENO PRODUCTS CO., a Corporation, and
GEORGE F. LINQUIST,

Appellants,

vs.

I. F. LAUCKS, INC., a Corporation,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

Appellee's Petition for Rehearing

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TO THE HONORABLE CURTIS D. WILBUR, WILLIAM H. SAWTELLE, AND FRANCIS A. GARRECHT, JUDGES IN THE ABOVE ENTITLED COURT:

Comes now I. F. LAUCKS, INC., appellee in the above entitled cause, and presents this, its petition for a rehearing of the above entitled cause, and in sup-

port of said petition for rehearing, the petitioner respectfully shows:

I. GROUNDS.

1. That in paragraph two, page 29, of the opinion of this Court entered herein on the 21st day of December, 1933, reading as follows:

> "As just indicated, however, we wish to add that there is, in our opinion, an equally cogent reason why the decree may not stand; namely: soya bean meal and soya bean flour are standard articles of commerce; and being such a sale thereof may not be enjoined."

the Court apparently overlooked the element of intent and therefore made an incomplete and misleading statement of the law applicable to cases of the character of the one at bar.

2. That the statement of the Court in said paragraph two, page 29, is in conflict with the authorities cited by this Court in its decision and threatens serious embarrassment, injustice and hardship to the petitioner, since the conduct of appellant against which complaint is made is of a continuing tort character and constitutes a serious danger to the petitioner's business presently and in the future.

3. That the statement of law above quoted is in conflict with the authorities cited by this Court in its decision and threatens embarrassment to this Court

and the bar generally where the facts of a particular case may supply the necessary proof of specific knowledge, intent or conspiracy.

4. That the Court made no mention and appears to have overlooked the opinion of the United States Supreme Court in the case of *Cortelyou vs. Charles E. Johnson,* said case being one of the two cases cited and stressed in support of its opinion.

5. That the Court did not mention and apparently overlooked the principles of the law of contributory infringement previously enunciated by it when the Court made the statement in said paragraph two, page 29, against which complaint is made herein.

6. This Court is petitioned to grant a rehearing upon the matters set forth in the foregoing grounds or in the alternative that said quotation be corrected by adding the following phrase, or such phrase as embodies the said thought, at the conclusion of the said quotation above—"in the absence of a showing of express intent or conspiracy to aid another in the infringement of a patented combination."

7. That this Court in concluding that appellants did not knowingly infringe the patent in suit, did not mention and apparently overlooked the notice furnished by the bringing of suit, March 27, 1928, on the Johnson patent and that the appellants continued to

furnish soya bean flour to the Kaseno Products Co. after instituting such suit.

8. That this Court in concluding that appellants did not knowingly infringe the patent in suit, did not mention, and apparently overlooked the notice furnished by the offer of appellee made at the conference between I. F. Laucks and appellant, Wilmot H. Lilly, on April 19, 1928, to contract for the entire output of soya bean flour of appellant and drop the pending suit.

9. That this Court in concluding that appellants did not knowingly infringe the patents in suit, overlooked the notice furnished by the bringing of suit, February 14, 1929, on the "Caustic" and "Carbonbisulphide" patents, and that the appellants continued to furnish soya bean flour to the Kaseno Products Co. after instituting such suit.

II. ARGUMENT.

Relative to grounds 1 to 8, inclusive, the argument set forth in the Petition for Rehearing in the companion cause, No. 7083, applies equally to this cause, No. 7084. For the convenience of the court, the same will not be set forth here in full, and such argument is incorporated herein by reference, for all in-

tents and purposes and to the same extent as if here set forth in full.

As respects ground 9, we submit that appellants, after the bringing of this suit, 7084, on the "Caustic" and "Carbonbisulphide" patents, February 14, 1929, had full knowledge, by reason of the detailed statements in the Bill of Complaint, of the infringing conduct of the direct infringer, the Kaseno Products Co., and therefore, the continuing to supply said direct infringer with the soya bean flour established beyond a peradventure of a doubt that the said furnishing of the flour was intentional and positive concerting with the Kaseno Products Co. in its infringing conduct.

Accordingly, we submit, there is no escape from the conclusion that, to quote the authority of *Orr-Ewing vs. Johnson,* cited page 47, appellee's opening brief:

> "However honest or inadvertent the original mistake may have been, a continuation of the use of it after that (infringement) was pointed out is in itself sufficient evidence of a fraudulent intention."

WHEREFORE, upon the foregoing grounds it is respectfully urged that this petition for rehearing be granted and the decree of this Honorable Court be

upon further consideration modified and amended as herein indicated.

Respectfully submitted,

RAYMOND D. OGDEN,
G. WRIGHT ARNOLD,
WARD W. RONEY,
CLINTON L. MATHIS,
Counsel for Petitioning Appellee.

CERTIFICATE OF COUNSEL.

We, the undersigned counsel of record, herein do hereby certify that we are counsel for the appellee in the above entitled cause; that we have carefully read over and considered the above and foregoing Petition for Rehearing, in the above entitled cause, and that in our judgment it is well founded and that it is not interposed for delay.

Dated this 17th day of January, 1934.

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